# Common Law and Statute in the Law of Employment

Professor Alan Bogg, Hertford College and University of Oxford

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ABSTRACT: Remarkably, the interaction between common law and statute has not attracted the scholarly attention it deserves, given that it is such a basic component of legal reasoning in common law systems. This is especially true in the law of employment, where the interaction between common law and statute is a pervasive feature of modern employment law. In recent years, scholars have started to rise to the challenge of developing principles to regulate this interaction, and this article provides a contribution to those debates. It builds upon Lord Hoffmann's controversial judgment in *Johnson v Unisys* to identify three modes of interaction: statute as pre-emptive of common law development; statute as an analogical stimulus of common law development; and common law fundamental rights. By connecting this analysis to background principles of legislative supremacy and fundamental rights, it argues that *Johnson v Unisys* provides an attractive constitutional vision of the relationship between Parliament and the courts.

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## I Introduction

How should the courts develop the common law governing the employment relationship in the 'Age of Statutes'?[1] This is a pressing question for employment lawyers, not least because our world has been so heavily dominated by legislation since the late 1960s and the emergence of the 'floor of rights'.[2] It is customary to begin such a venture by signalling that the interaction between common law and statute has been under-explored. Given that this interface is such a basic component of legal reasoning, that lack of attention is surprising. It is nevertheless also fair to say

[1] See Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard UP 1982).
[2] On the statutory 'floor of rights', see Lord Wedderburn, *The Worker and the Law* (2nd edn, Penguin 1971) 33.

that that challenge is now being met admirably by legal scholars from across a wide range of legal disciplines.[3] It is also being addressed by some fine contributions in employment law too.[4] This article is offered as a modest contribution to those debates.

Improbably, given my impeccable credentials as a progressive employment lawyer, the arguments were inspired by Lord Hoffmann's speech in *Johnson v Unisys Ltd.*[5] As all employment lawyers know, Mr Johnson lost his case. Paradoxically—perversely even—he lost his common law case of wrongful dismissal because of the existence of a protective statute. For many employment lawyers, the result was enough to discount *Johnson* as an unspeakable aberration. I subscribe to a different view, though it will no doubt be regarded as a provocative one: Lord Hoffmann's speech in *Johnson* presents a compelling constitutional vision of the interaction between common law and legislation, and it is one that keeps the judges (and Parliament) in their proper place. In short, Mr Johnson's loss was the Constitution's gain.

Another reason for the hostility to *Johnson* is the tendency to overlook its dynamic potential. Critics have tended to regard Lord Hoffmann's judgment as ossifying the common law, stymieing its capacity to develop as a body of worker-protective norms. This is especially troubling in the new constitutional context of employment law, where legislation is as likely to be used to disempower workers as emancipate them, and neo-liberal governments pose a profound threat to the fundamental rights of workers and trade unions. This underestimates what is on offer in *Johnson*. We need to look beyond the narrow result in *Johnson* to the richness of its reasoning. Lord Hoffmann's judgment envisages three modes of interaction between statute and common law. The first mode is represented in *Johnson* itself, which is statutory pre-emption of common law development. The second mode envisages statute as a trigger for common law development, and a source of analogical inspiration. The third mode envisages a role for common law fundamental rights, which provides the occasion for a rather complex set of interactions between common law and statute. This creates constitutional space for the common law to develop as a bold and progressive body of norms in employment law, sometimes alongside legislation and sometimes in opposition to it. The development of principles to regulate that interaction has been rather stunted. Indeed, it is nothing short of remarkable that *Johnson* itself provided the first occasion where the constitutional context to this core problem of legal reasoning was given an extended judicial consideration. In the next section, the reasons for that atrophy are considered. Thereafter, each mode of interaction is then examined in turn.

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[3] For some recent examples in private law, see J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 LQR 247; Andrew Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 LQR 232, 239; TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart 2013).

[4] ACL Davies, 'The Relationship Between the Contract of Employment and Statute' in Mark Freedland and others (eds), *The Contract of Employment* (OUP 2016).

[5] [2001] UKHL 13, [2003] 1 AC 518.

## II Common Law and Statute in the Law of Employment

According to Loughlin, public law thought in Britain was 'a polarized consciousness and it is in the styles of normativism and functionalism that we may identify the essential polarities'.[6] It is striking how a parallel 'polarized consciousness' also permeated the historical development of employment law.[7] These styles of thought represented fundamentally divergent theories of the common law and legislation. For common law normativists, the common law embodied the public reason of the political community, the community's norms refined through incremental historical development in the common law courts.[8] Statute represented a debased legal technique that often reflected the sectional interests of groups such as trade unions, especially following the widening of the democratic franchise.[9] For functionalists, by contrast, the common law represented a highly regressive and anti-democratic impediment to progressive social and economic change. Enduring political change was to be achieved through the deployment of governmental power, in the form of primary legislation and the growth of the administrative state.[10]

These debates would often play out like some kind of Punch and Judy show, the common law normativist's disdain for legislation matched only by the functionalist's disdain for the common law. This explains the functionalist's preoccupation with the 'autonomy' of labour law, insulating labour legislation from the institutions and doctrinal techniques of the common law.[11] The quest for principles to regulate and restrain the common law would have been regarded by the functionalist as futile, since principles were always liable to be subverted by the common law judiciary. It also explains the common law normativist's aversion to any statutory disruption of the common law's prized internal coherence. This was sometimes reflected in the judicial propensity to interpret the statutory immunities from tort liability in strike law restrictively as extraordinary privileges from the ordinary law.[12] It was also manifest in the importation of restrictive contractual concepts into the judicial development of protective statutory employment rights.[13] The resulting polarization was paralysing, stultifying the development of principles to regulate the interaction between common law and statute.

This stultification is now untenable. At a practical level, modern employment law is usually an amalgam of statute and common law. The effect of this amalgam is, as Freedland has argued:

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[6] Martin Loughlin, *Public Law and Political Theory* (OUP 1992) 61.
[7] For a discussion of this feature of labour law scholarship, see Alan Bogg, 'The Hero's Journey: Lord Wedderburn and the "Political Constitution" of Labour Law' (2015) 44 ILJ 299.
[8] For a discussion of the common law as 'public reason', see TRS Allan, 'Text, Context, and Constitution: The Common Law as Public Reason' in Douglas E Edlin (ed), *Common Law Theory* (CUP 2007).
[9] Loughlin (n 6) ch 5.
[10] ibid ch 6. For further discussion, see Lord Wedderburn, 'Laski's Law Behind the Law. 1906 to European Labour Law' in Richard Rawlings (ed), *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1985–1995* (OUP 1997).
[11] Bogg, 'The Hero's Journey' (n 7) 307–309. Pleas for labour law's 'autonomy' are still clamorous, and not confined to the English common law. See eg Gordon Anderson, 'The Common Law and the Reconstruction of Employment Relationships in New Zealand' (2016) 32 *International Journal of Comparative Labour Law and Industrial Relations* 93.
[12] See eg Lord Diplock in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 (HL) 156H, where he described the immunities as 'intrinsically repugnant'.
[13] Steven Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29 ILJ 223.

> [T]o produce significant areas of fusion between the two—a phenomenon which has long existed, but which is now fairly central to this area of the law … We should understand that we are now talking about not so much the common law of employment contracts, as the *common law based* law of employment contracts.[14]

Statutory interventions in employment law are often grafted onto specific types of contractual relation, such as the 'worker' concept or the 'contract of employment', or integrate contractual concepts into statutory formulae. This represents a kind of 'hybridity' in legal form.[15] Whatever the abstract virtues of the 'autonomy' of labour law, the prospects for its political realization seem more remote than ever. We should engage in the task of developing workable legal principles in the world as it is, rather than the world as we would like it to be.

At a normative level, the conceptual maps of the functionalists and common law normativists are no longer fit for purpose. In particular, legislation is increasingly used as an instrument to deregulate employment protection or even threaten the worker-citizen's fundamental rights. Historically, of course, employment legislation was traditionally the bulwark against an oppressive common law, and it provided a source of emancipation for workers. Should the common law simply stand aside if legislation is put to oppressive ends? In public law, for example, judges have developed the common law as a source of protection where legislation cuts against the citizen's fundamental rights.[16] It would seem perverse not to explore the emancipatory potential of the common law in employment law too. Functionalism and common law normativism are ill-suited to assisting in the search for legal principle in the new era of common law fundamental rights. The historical picture in employment law of the legislator as hero and judge as villain is now far too simplistic. Common law and statute interact in a multiplicity of ways, the constitutional considerations are increasingly complex in character, and the strategic calculations of workers and trade unions in using the law more finely balanced. There is an urgent need for judges and scholars to develop principles to ensure that these interactions occur in a coherent and rational manner.

In my view, Lord Hoffmann's judgment in *Johnson* represents the most significant judicial engagement with this task to date. His judgment identifies three modes of interaction between legislation and the common law: statute as pre-emptive of common law development, statute as analogical stimulus to common law development, and common law as an independent source of protection for fundamental rights. Whether statute pre-empts or prompts common law

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[14] Mark Freedland, *The Personal Employment Contract* (OUP 2003) 4.

[15] See the perceptive comments of Sedley LJ and his use of the 'hybridity' description in *Bournemouth University Higher Education Corp v Buckland* [2010] EWCA Civ 121, [2011] QB 323 [19].

[16] See eg Lord Hoffmann's articulation of the legality principle in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) 131, to the effect that 'Fundamental rights cannot be overridden by general or ambiguous words … In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual'.

development will depend upon the nature of the statute, the specific area being regulated, and the background principles of democracy, legality, and fundamental rights.

The remainder of the article will examine each mode. The first mode, which is the most highly developed, is statutory pre-emption. This has been of particular significance in the interaction between statutory unfair dismissal and common law wrongful dismissal. Indeed, this was the specific focus in the *Johnson* litigation. The article provides a cautious defence of statutory pre-emption of common law development of wrongful dismissal, on the basis of a theory of judicial incrementalism. Statutory pre-emption is also relevant to the statutory exclusion of tort liability for strike organizers. In contrast to wrongful dismissal, statutory pre-emption has not played a significant role in the sphere of economic tort liability. This is an area of the common law that would benefit from an extension of the *Johnson* pre-emption principles.

In the second mode, statute operates as a stimulus to common law development. The article examines two examples of this: the development of the implied term of mutual trust and confidence; and the development of a 'purposive' approach to identifying employees and workers for the purposes of statutory employment protection. In this context, the integration of statute and common law has been shallow rather than deep. Its shallowness is reflected in the fact that whilst statute triggers and sets in train a process of common law development, the policies embodied in relevant legislation have not tended to influence the subsequent trajectory of common law development to a great degree. In the final section of the article, the potential role of common law fundamental rights is examined, and I suggest some ways in which judicial engagement with common law fundamental rights would promote a deeper integration of statute and common law.

Before proceeding, four general themes can be identified: the limits of textual argumentation; the role of interpretive disagreement about core constitutional concepts; the nature and degree of integration between statute and common law in legal interpretation; and the primacy of legislation. Starting with the first theme, textual or linguistic arguments about the canonical meaning of statutes are of limited use in providing guidance as to how the common law should be developed.[17] Sometimes, the statutory language may provide a useful starting-point. For example, the fact that the compensatory award in unfair dismissal is subject to a statutory cap might suggest that statutory pre-emption is the most appropriate mode of interaction. Or the fact that legislation in an area of activity is comprehensive and detailed might also support statutory pre-emption of common law development.[18] Ultimately, however, textual arguments only provide starting points for analysis. Analysis must go deeper, using normative arguments about the appropriate allocation of decision-making between different branches of government. This will be informed by background constitutional values and empirical sensitivity to the strengths and weaknesses of common law adjudication as a form of decision-making.

[17] Maria Lee, 'Occupying the Field: Tort and the Pre-emptive Statute' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart 2013) 389.
[18] J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 LQR 247, 258.

The second theme emphasizes that disagreements about the interaction between statute and common law should be understood as *interpretive* disagreements.[19] In determining whether a statute should pre-empt or stimulate a common law development, judges must reckon with constitutional controversies about legislative supremacy and parliamentary sovereignty, the separation of powers, and the rule of law. These normative concepts are complex and contested, and often attract animated normative disagreement. We must be normatively committed in order to defend one interpretation over another. The interpretive engagements with fundamental constitutional concepts are inescapable in reasoning about the interaction between common law and statute, always latent even if obscured by the economy of judicial language or blithe assertions of judicial common-sense.

The third theme invites an acknowledgement of the pervasive role of the common law, which informs the interpretation of statutory provisions as a prelude to determining the effects of legislation on developing common law doctrines. As TRS Allan has argued:

> The meaning of a statutory provision is as much a function of the context in which its language appears as the dictionary meaning or meanings of its component words and phrases. And the context includes the broader constitutional backcloth against which any amendments to the current law must be viewed and understood.[20]

On this approach, we should not regard the common law as like a fluid that occupies interstitial gaps left open by statutes whose meanings are pre-interpretively plain and clear. The common law, with its embedded notions of legality, democracy and fundamental rights, shapes the entire process of legal reasoning. It informs the interpretation of the legislative text, the construction of its legislative purposes, and its subsequent modes of interaction with the specific common law doctrines. In this way, there is a deeper form of integration of statute and common law, so that 'the law is constructed, by painstaking argument, from the building blocks provided by both statute and precedent, interpreted in a mutually supportive way'.[21]

The fourth theme is the 'primacy of statute'.[22] In part, this reflects a core constitutional doctrine of legislative supremacy, and the importance of judicial fidelity to enacted legislation reflecting the democratic will in a parliamentary democracy.[23] Primacy of statute is also warranted by the nature of certain decisions as polycentric in nature. Polycentricity describes a situation where there is 'a large network of interlocking relationships, such that a change to any one relationship causes a series of complex changes to other factors'.[24] As an example of a polycentric

[19] In this respect, I am indebted to TRS Allan's account of interpretive public law. See TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) 9.
[20] ibid 173.
[21] ibid 171.
[22] ACL Davies (n 4) 81.
[23] TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (OUP 1993) 81.
[24] Jeff King, *Judging Social Rights* (CUP 2012) 190.

problem, Lon Fuller offers the example of wages and price setting.[25] An adjudicative institution such as a court could not feasibly or sensibly undertake this task, because 'the forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages'.[26] Even the sturdiest of employment lawyers would surely balk at the prospect of a judicially imposed minimum wage in the absence of a statutory intervention to that effect. While polycentric problems are pervasive across private law,[27] they are especially prevalent in the field of employment law. To the extent that private lawyers fail to take polycentricity seriously, and accord a default priority to common law decision-making in general private law, such accounts are certainly vulnerable to criticism. A failure to take polycentricity sufficiently seriously is a more significant vice in employment law, however. There is a strong imperative in favour of judicial restraint where the law encounters a polycentric problem, and this provides the most cogent explanation of the deference to legislation in *Johnson* itself.

It is also important to acknowledge the 'political' character of employment law.[28] Employment law is riven by deep and enduring disputes about the distribution of economic power in the political community. There is a corresponding political virtue in channelling those disagreements into political modes of adjustment, with the outcomes of political negotiation embodied in legislation. The mediation and adjustment of competing interests through political compromise offers a safety valve that facilitates social compromise in a pluralistic community marked by material conflicts.[29] The judicial disruption of those political compromises through the common law risks bringing the judiciary and the common law into disrepute. This explains the pattern of employment law as a legal discipline based predominantly on statute.[30] Employment law is not 'political' in virtue of the significant presence of legislation in the field; rather the predominance of legislative enactment in employment law is a reflection of the sharp 'political' conflicts that make up the daily lives of its principal protagonists, workers and employers.[31] For these reasons, whilst there are general constitutional reasons in favour of the 'primacy of statute', there are also extra reasons specific to the particularities of employment law. Nevertheless, the invocation of the 'primacy of statute' is little more than a starting point in hard cases. Statutes can be accorded primacy whilst impeding, excluding or propelling common law developments. The key enquiry is to ascertain what the 'primacy of statute' might require in a specific context.

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[25] Lon L Fuller, 'The Forms and Limits of Adjudication' (1978–1979) 92 Harvard LR 353, 394.
[26] ibid.
[27] Lord Sumption, 'The Limits of Law' in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016). In the same volume, Craig argues persuasively that polycentricity is a feature of private law as much as public law adjudication: see Paul Craig, 'Limits of Law: Reflections from Private and Public Law' ibid. See also Anthony Mason, 'A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart 2016) 134, who argues that there is a need for judicial restraint where the court is not institutionally equipped to undertake the enquiries necessary for a rational development of the law.
[28] Lord Wedderburn, *The Worker and the Law* (3rd edn, Penguin 1986) 835.
[29] Sumption (n 27) 24.
[30] This is reflected in the views of Paul Davies and Mark Freedland that modern employment law has been shaped predominantly by legislation and governmental activity: see Paul Davies and Mark Freedland, *Labour Legislation and Public Policy: A Contemporary History* (OUP 1993).
[31] I am grateful to Elias LJ for pressing me on this point in a stimulating discussion following the lecture.

## III Statutory Pre-emption of Common Law Development

### Statutory Pre-emption of the Common Law and Dismissal

It is appropriate to begin with *Johnson v Unisys*. Mr Johnson was employed in a senior position in a computer software company. He was summarily dismissed and given a month's wages in lieu of notice. He lodged an internal appeal that was unsuccessful. He then made a successful claim for unfair dismissal, a statutory claim now contained in Part X of the Employment Rights Act 1996 (ERA 1996), receiving the maximum compensation of £11,691.88 available at that time under the legislation. Following his dismissal, Mr Johnson suffered a major psychiatric illness involving a period of hospitalization. During his period of recovery, Mr Johnson was unable to find alternative employment. It seemed very likely that his difficulties in finding another job were associated with having suffered from the psychiatric illness that had been triggered by the manner of his dismissal.

Mr Johnson then instituted proceedings in the County Court for breach of contract and negligence under the common law in order to circumvent the limits on the compensatory award under the statutory unfair dismissal framework. His principal claim was an alleged breach of the implied term of mutual trust and confidence. He further alleged that the manner of his dismissal caused his mental breakdown and his subsequent inability to work, leading to a loss of earnings in excess of £400,000. The employer's application to strike out this claim was successful in the County Court and on appeal to the Court of Appeal,[32] and in a unanimous House of Lords. While the House of Lords decision rested upon a variety of legal bases, *Johnson* is most widely known for Lord Hoffmann's 'parliamentary intention' argument. According to Lord Hoffmann:

> For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.[33]

Mr Johnson had already been successful in his unfair dismissal claim, and he had been awarded what was due to him under its scheme of limited remedies.

There are certainly some difficulties with the reasoning in *Johnson*. Lord Hoffmann's reference to 'parliamentary intention' is opaque and distracting. As Maria Lee has argued within the context of a similar set of regulatory problems in environmental law, 'the difficulty of extracting Parliamentary intention from the language of statute is well recognised'.[34] Nor does it seem constitutionally appropriate for 'parliamentary intention' to inform the identification of the common law.[35] In short, it is a piece of legal fiction to suggest that the answer to the very difficult

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[32] [1999] 1 All ER 854 (CA).
[33] *Johnson* (n 5) [58].
[34] Lee (n 17).
[35] See PS Atiyah, 'Common Law and Statute Law' (1985) 48 MLR 1, 19: 'I think a lawyer today would say that the common law is by definition what the judges say it is; Parliament may command the judges to change the rules they apply … but Parliament cannot make the common law different from what the judges say it is any more than it can alter a historical fact.'

question of how to develop the common law of wrongful dismissal is hidden away somewhere in Part X of the ERA 1996 awaiting judicial divination.

Charitably, 'parliamentary intention' may be shorthand for three good constitutional arguments that do need to be taken seriously: first, the democratic argument in favour of 'primacy of statute'; secondly, the high degree of polycentricity involved in developing the common law to construct a general remedy for dismissals; finally, the wider allocative impact of a decision in Mr Johnson's favour. Let us call these the argument from legislative finality; the argument from polycentricity; and the argument from allocative impact.[36] Each of these considerations justify treating the statute as pre-emptive of a general common law remedy. Before presenting those constitutional arguments, however, there is a need to dispense with a red herring that has sometimes confused the critical analysis of *Johnson*.

First, the red herring. Critics of *Johnson* are sometimes keen to point to examples of other legislation that has not pre-empted common law development. A favourite example is the parallel development of common law liability for workplace injuries, alongside a highly developed statutory regime of workmen's compensation.[37] If the statute operated as a 'floor' here, then why not in *Johnson* too? We should be wary of relying too heavily on remote statutory analogies. As Lee has observed in the context of tort and statute, the issues are 'too rich to be captured by a single command across the board: "pre-empt", or don't "pre-empt"'.[38] The history of workmen's compensation legislation indicates that the analogy is not a helpful one. In Bartrip's history of this area of the law, he identifies the parallel co-existence of statutory and common law remedies as an enduring feature of workmen's compensation.[39] Thus, the Workmen's Compensation Act 1897 specifically stated that the legislation did not affect any civil liability of the employer at common law.[40] This retention of common law negligence liability was justified by Joseph Chamberlain as a response to the danger of workmen being under-compensated by the statutory remedy in serious cases of employer negligence.[41] In practice the common law remedy was marginal for workers' compensation claims during the 1920s and 1930s. As Deakin has explained, the 'cap' on compensation in the Workmen's Compensation Acts was generally sufficient to provide adequate compensation for most employees, and there were procedural advantages in employees pursuing compensation under the legislation, the effect of which was to bar a claim in tort.[42]

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[36] As will be clear from what follows, this framework is indebted to Jeff King's articulation of a theory of adjudication in *Judging Social Rights*: King, *Judging Social Rights* (n 24).
[37] See Alan Bogg and Hugh Collins, 'Lord Hoffmann and the Law of Employment: The Notorious Episode of *Johnson v Unisys Ltd*' in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Hart 2015) 193.
[38] Lee (n 17) 383.
[39] PWJ Bartrip, *Workmen's Compensation in Twentieth Century Britain: Law, History and Social Policy* (Gower 1987).
[40] ibid 219.
[41] ibid 219–220.
[42] Simon Deakin, 'Tort Law and Workmen's Compensation Legislation: Complementary or Competing Models?' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart 2013) 259–260.

For a variety of reasons the practical significance of the common law began to grow again during the 1940s.[43] It was no surprise, therefore, that William Beveridge recommended the setting up of a committee to consider the issue of alternative remedies in 1944, chaired by Sir Walter Monckton.[44] Reporting in 1946, this recommended the retention of common law liability alongside the social insurance regime. When the Workmen's Compensation legislation was repealed in 1948, the common law of tort became central to employer liability for workplace injuries. This acceleration occurred *after* the repeal of the legislation; hence the legislation could not be described as constituting any kind of 'floor' for common law development. The context makes clear that the Workmen's Compensation Acts were never conceived as 'pre-emptive' statutes.

Having disposed of the red herring, we can now return to more relevant concerns. Starting with the *argument from legislative finality*, there are strong general arguments requiring the fidelity of judges to primary legislation enacted by democratic legislatures.[45] Within the context of unfair dismissal legislation, the statute embodies a comprehensive scheme of regulation of dismissal with carefully crafted limitations on the scope of the right, its available remedies, and the creation of special adjudicative mechanisms for considering complaints of unfair dismissal. Furthermore, this is not a legislative settlement that was finalized and forgotten by the legislature. On the contrary, its limits and restrictions have been revised at regular intervals across its 40-odd-year life-span. In these circumstances, the judicial obligation of fidelity and obedience to democratically enacted legislation has significant weight.[46]

In his important work on the adjudication of social rights, King has rightly observed that the democratic argument supporting what he describes as 'finality of legislation' is subject to limits.[47] Specifically, it might be possible to modify the default of strong judicial deference to primary legislation where there has been an absence of deliberative legislative focus on the relevant rights issues in the enactment of the legislation.[48] The modification of strong judicial deference might also be warranted where the legislative process has failed to consider the interests of groups that are 'particularly vulnerable to majoritarian bias or neglect'.[49] To what extent are groups excluded from unfair dismissal protection 'particularly vulnerable to majoritarian bias or neglect'? This formula would encompass groups such as 'the disabled, the elderly, the homeless, (some) social assistance recipients, certain isolated religious minorities, single parents, those with uncommon diseases or disabilities, those with mental health problems, and so on'.[50] It could be argued that there are certain groups of especially vulnerable workers whose interests have been

[43] Bartrip (n 39) 223.
[44] ibid 224–228.
[45] The leading work is still Jeremy Waldron, *Law and Disagreement* (OUP 1999).
[46] This argument is correspondingly weakened where changes to the qualification periods and other aspects of the legal framework were introduced through secondary legislation that bypassed parliamentary debate. I am grateful to Jeremias Prassl for asserting this point.
[47] King, *Judging Social Rights* (n 24) 163–169.
[48] ibid 164–165.
[49] ibid 165–169.
[50] ibid 182.

systematically disregarded in the design of the statutory regime. For example those on 'atypical' or 'zero hours' contracts who fail to meet the two year continuity threshold are badly affected. Also, workers who are in highly precarious or even 'sham' self-employment arrangements and hence struggle to satisfy the requirement of a 'contract of employment' are vulnerable too. These economically vulnerable groups of workers are likely to lack political efficacy in the democratic process, given that economic, social and political exclusion tends to be mutually reinforcing. These considerations are not fanciful, and they attenuate the strength of the argument from legislative finality.

Against those concerns, we must also weigh in the problem of 'giving the middle classes and the wealthy powers to obtain benefits from the constitutional jurisdiction of courts, over and above the unequal influence they already enjoy in the legislature'.[51] Like many litigants in employment law in recent times, Mr Johnson was a high-status employee with considerable earning capacity. As Lord Steyn observed in *Johnson*:

> The statutory system was therefore always only capable of meeting the requirements of cases at the lower end of seriousness. Manifestly, it was always incapable, for example, of affording any significant financial compensation to employees with substantial salaries and pension entitlements in cases where they suffered a serious loss of employment prospects due to the manner of their dismissal. In such cases, inter alia, the artificial statutory limits from the inception inhibited significant compensation.[52]

In my view, this provides an argument *against* developing the common law to permit a remedy, *not* an argument in favour of a parallel common law remedy. Otherwise, wealthy high-status employees might deploy their superior resources in litigation to benefit from a common law circumvention of the remedial limits in the statutory jurisdiction. This might be at the expense of lower skilled employees in the shape of redundancies, or overall reductions of wages and other financial benefits, or fewer employment opportunities for the unemployed. It undermines norms of democratic equality where courts compound the advantages of wealthy middle class employees who may already be privileged in the wider democratic process.

Consequently, there are strong democratic arguments in favour of treating the unfair dismissal legislation as pre-emptive of common law development in *Johnson,* although those arguments are by no means conclusive. This judicial restraint is also supported by the *argument from polycentricity*. King's work on polycentricity has provided a sophisticated account of its nature and significance in social rights adjudication. Building upon Fuller's seminal work, King has argued that polycentricity contemplates a situation 'when the court is asked to make or should make a finding about the substantial and heterogeneous interests of a large number of non-

[51] ibid 185–186.
[52] *Johnson* (n 5) [23].

represented persons'.[53] Furthermore, these non-represented interests are a 'primary consideration' in situations where the court is being invited to overrule established common law precedents or qualify common law rules.[54] In my view, the dispute in *Johnson* was a paradigm case of what King would characterize as a primary polycentric dispute. Mr Johnson was arguing for a significant extension of the implied term of trust and confidence, disrupting long-standing common law precedent on wrongful dismissal.[55] It involved a legal claim for recovery for the economic losses attributable to psychiatric injury caused by the breach of contract, an area of the common law that has been replete with policy anxieties about the scope of recovery for 'nervous shock'. Although Lord Hoffmann did not use the language of polycentricity, it would seem that the substance of those concerns gave Lord Hoffmann significant pause for thought in *Johnson*. It was entirely appropriate that they should do so.

One of the advances marked in King's analysis of polycentricity is his rejection of the idea that its presence marks a zone of non-justiciability. Since polycentricity is 'pervasive',[56] in both public and private law,[57] a non-justiciability approach would be inappropriate. Rather, it is necessary to identify ways in which polycentricity might be either 'attenuated' or magnified as a legitimate consideration in social rights adjudication.[58] In my view, the presence of attenuating factors in *Johnson* is limited. First, the House of Lords was being invited to hold that mutual trust and confidence, *a term implied in law in all contracts of employment*, augmented the rights and remedies of employees in wrongful dismissal claims. Consequently, this was not a case where the claim could have been decided on narrow grounds. Rather, it created a serious risk of establishing 'a broadly applicable precedent uncontrollable through sound case management'.[59] The wider distributive consequences of such a broad holding on employment practices were unknown and, to a court at least, unknowable. To decide in Mr Johnson's favour in these circumstances would have been a momentous step,[60] and an irresponsible shot in the dark.

Secondly, this was not a public law dispute but a dispute between private parties. Consequently, the state was not represented in the legal proceedings as it might have been in judicial review proceedings, and hence the wider 'public interest' could not be vindicated in bipolar litigation between private parties. Whilst it is possible for the court to give permission to third party intervenors in appeals,[61] there was no such intervention in *Johnson*. Furthermore, even if the court had given permission for third party intervention, it is unlikely that the House of Lords

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[53] King, *Judging Social Rights* (n 24) 195.
[54] ibid.
[55] *Addis v Gramophone Co Ltd* [1909] AC 488 (HL) (*Addis*).
[56] King, *Judging Social Rights* (n 24) 192.
[57] Craig, 'Limits of Law' (n 27).
[58] King, *Judging Social Rights* (n 24) 198–210.
[59] ibid 203.
[60] According to Lord Hoffmann, to decide in Mr Johnson's favour would not have been an 'incremental' step for the common law to take: *Johnson* (n 5) [47].
[61] For example, the Supreme Court Rules 2009, SI 2009/1603, r 26 states that any person may apply to the Court for permission to intervene in the appeal. I am grateful to Professor Adrian Zuckerman for a very helpful discussion of this aspect of the case.

would have been competent to evaluate complex social science data on the possible labour market consequences of the reversal of *Addis* in wrongful dismissal claims.

Ultimately, of course, there is no 'correct' moral or economic answer to the adjustment of trade-offs between employers, 'high-status' employees, 'low-status' employees, employees on short-term contracts, self-employed workers, the unemployed, and so forth. The adjustments are messy, ad hoc, and often contingent on the balance of social forces between different groups of workers. In other words, the adjustments are *political*. This may count in favour of the technique of legislative compromise, such as is reflected in the statutory cap on the compensatory award.[62] Such legislative compromises can also be readjusted through legislative change. Deference to the political process would of course be subject to the ongoing need for courts to be astute to the potential marginalization of groups that are vulnerable to systematic majoritarian bias in the democratic process. 'Casual' workers are the likeliest group to form such a category under current labour market conditions.

Finally, the *argument from allocative impact* lends further support to Lord Hoffmann's constitutional reservations in *Johnson*. King has defined allocative impact as 'the financial or distributional adjustment made necessary by a court's judgment'.[63] In *Johnson*, the potential allocative impact of the decision was significant. Building upon King's representative list of allocative impact factors generated by legal judgments,[64] the following distributional adjustments may have occurred if *Johnson* had been decided in the claimant's favour: (i) judgment damages of over £400,000 and the associated costs of compliance with the court's order; (ii) legal representation costs; (iii) costs of legal and Human Resources compliance for public and private sector employers adjusting to the new wrongful dismissal regime; (iv) insurance costs reflecting the increased potential financial liabilities of employers in dismissal claims; (v) defensive hiring policies, particularly in relation to the hiring of employees with a history of mental illness; (vi) reduced willingness of employers to hire new employees on permanent contracts of employment, reducing public revenue from taxation and increasing burdens on welfare state provision; (vii) further appellate litigation to clarify the limits of the judgment, whether it applied to stigma damages in wrongful dismissal claims, whether trust and confidence could be waived through an express contractual term, and so forth. Where the interpretation of a statute or the following of an applicable precedent is clear, such allocative impact considerations should be irrelevant to the court's task. In cases such as *Johnson*, where the court is being invited to take a significant interpretive step, it would be irresponsible for the court *not* to weigh the allocative impact in the balance of relevant considerations. In *Johnson*, the allocative impact costs were significant and

[62] Sumption (n 27).
[63] Jeff A King, 'The Justiciability of Resource Allocation' (2007) 70 MLR 197, 197. King defines 'allocative impact' as pertaining to a situation where 'the effect of the decision is to impose a financial burden upon *public* resources' (ibid 208). Here my usage would encompass the imposition of a financial burden upon public *or* private resources. The extension to 'private' resources would seem to be a relevant matter for courts to consider in exercising discretion to develop the law in cases such as *Johnson*.
[64] King, *Judging Social Rights* (n 24) 257.

any judicial prediction of how they might unfold prone to significant error, given the dynamic complexities at play.

In the immediate aftermath of *Johnson*, the critical reaction in the academic literature was fierce and uncompromising. Recent engagements with *Johnson* have adopted a more sympathetic and conciliatory tone.[65] The case law that has followed on from *Johnson* has continued to attract significant criticism for its doctrinal incoherence. In strictly doctrinal terms, I am sympathetic to those criticisms. However, if we interpret those later judgments through the lens of *a theory of adjudication*, rather than through a theory of doctrinal legal concepts, it is possible to identify a logic underlying the doctrinal oddities. In particular, the jurisprudence that followed *Johnson* can be understood as an exercise in judicial incrementalism,[66] cautiously extending the reach of common law protection in manageable steps so as to preserve flexibility in the light of the significant allocative impact considerations that cautioned restraint in *Johnson*. We shall first consider *R (Shoesmith) v OFSTED*,[67] and then the highly controversial Supreme Court decision in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*.[68] This provides a helpful reminder that writing a case note is a different exercise to writing a judgment, since the latter may have a seismic impact on the lives of real people.

In *Shoesmith* the occupant of the statutory post of Director of Children's Services at Haringey Council was removed from her post under instruction from the Secretary of State in the febrile aftermath of the 'Baby P' tragedy. In granting her public law remedies as an office-holder, Maurice Kay LJ had regard to the remedial and procedural inadequacies of the statutory unfair dismissal remedy relative to judicial review as a justification for permitting her judicial review claim to proceed.[69] He thus inverted the reasoning in *Johnson*, where the limits in the statutory regime were used as a justification for blocking common law development. Given that this inverts the reasoning in *Johnson*, does this reveal incoherence in the common law of wrongful dismissal? Deploying the theory of incremental adjudication, in the light of the allocative impact concerns in *Johnson*, I think there are four distinguishing features that explain the divergence between *Johnson* and *Shoesmith*.

First, the court in *Shoesmith* was applying well-established common law rules and techniques in judicial review, rather than developing the common law in a novel and striking way. Secondly, the common law intervention was tailored very narrowly to 'office-holders' in public law, thereby limiting the scope of potential beneficiaries. Thirdly, the judgment was heavily particularized. The facts were, on any view, extreme. It involved an outrageous abuse of public power, in the form of a heavy-handed and populist intervention by a Secretary of State in circumstances that were catastrophic for Ms Shoesmith's future employability. Added to this is

[65] See eg ACL Davies (n 4) 86–89.
[66] Once again, my indebtedness to King's theory of social rights adjudication should be acknowledged: see King, *Judging Social Rights* (n 24) ch 10.
[67] [2011] EWCA Civ 642, [2011] IRLR 679.
[68] [2011] UKSC 58, [2012] 2 AC 22.
[69] *Shoesmith* (n 67) [87].

the particularizing tendency of judicial review proceedings to isolate 'a specific decision or series of decisions and evaluating it in the context of the powers being exercised'.[70] Finally, the harm in *Shoesmith* involved stigma and reputational injury rather than psychiatric injury. In this way, it was delinked from the wider common law anxieties about 'floodgates' in recovery for nervous shock. Freedland and Kountouris are correct in suggesting that there will be little 'trickle down' of the holding in *Shoesmith* to rank and file public sector workers.[71] From the perspective of allocative impact, and a theory of incremental adjudication, that is a virtue rather than a vice.

*Edwards* is a more controversial decision. The majority of the Supreme Court concluded that express contractual terms guaranteeing disciplinary procedures could not give rise to an action for 'stigma' damages but could be enforced only through an injunction. It would only be possible for such a contractual term to be enforced through an action for damages where there was a *further* express term in the contract to this effect. According to three of the Justices (Lord Dyson, Lord Wilson, and Lord Mance SCJJ), this conclusion followed from the constitutional reasoning in *Johnson*. Since most disciplinary procedures were adopted pursuant to compliance with the statutory unfair dismissal jurisdiction, requiring notification in the employee's right to a written statement of employment particulars under section 1 of the ERA 1996, this meant that 'Parliament has decided, at least in most cases, that contractual force should be given to applicable rules and procedures'.[72] From the perspective of doctrinal coherence, *Edwards* is a very problematic decision. In particular, even if employers have introduced workplace disciplinary procedures to comply with unfair dismissal law, it does not follow that such procedures are contractually binding. That falls to be determined on the basis of ordinary contractual principles governing the incorporation of terms.[73] Where there is an express term in the contract, it should be enforceable in the ordinary way by an action for damages.

Nevertheless, it might be possible to explain the odd doctrinal contours of *Edwards* using the theory of incremental adjudication. According remedial primacy to the injunction avoids many of the allocative impact concerns in *Johnson*. While there will certainly be costs associated with the issuing of an injunction, those costs are far more predictable than would be the case for assessing stigma damages on a case-by-case basis. After all, the employer is simply required to observe the procedure that it has already agreed to in the contract. The existence of a 'double lock' requiring a *further* express agreement for claiming stigma damages for breach of the procedural term provides an extra opportunity for the allocative costs of enforcement to be adjusted through contractual negotiation. In effect, this is a form of deference to private negotiation as a procedural solution to a polycentric problem in employment law. This allows the impact of *Edwards* to be

[70] Mark R Freedland, 'Government by Contract and Public Law' [1994] PL 86, 97.
[71] Mark Freedland and Nicola Kountouris, 'Common Law and Voice' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 361.
[72] *Edwards* (n 68) [28].
[73] Alan Bogg, 'Express Disciplinary Procedures in the Contract of Employment: Parliamentary Intention and the Supreme Court' (2015) 131 LQR 15.

assessed and calibrated, leaving courts further room for manoeuvre to revisit the holding once its wider impact is better known.

Finally, *Edwards* exemplifies what might be described as a strategy of 'avoidance'.[74] Many legal threads are left hanging. Does *Edwards* apply to the breach of express terms placing substantive restrictions on the dismissal power? Is it confined to stigma damages or do its restrictions extend to damages for psychiatric injury? Is the recovery of *Gunton* damages (wages for the period of time it would have taken to conduct the process) permitted after *Edwards*?[75] This leaves open the possibility for further incremental development of the law on wrongful dismissal. Yet it is fair to say that the high degree of legal uncertainty generated by *Edwards* may be counterproductive, as employers and employees resort to further litigation to discover what the decision really means.[76] This generates rather than mitigates allocative impact problems.

## Common Law and Statute in the Law of Strikes

In Wedderburn's vivid description, strike law has often resembled a pendulum which 'had swung to and fro between judicial liabilities and statutory protection'.[77] As judges developed new common law liabilities to impede the collective action of trade unions, especially through the extension of tort liability for strike organizers, Parliament intervened through legislation to exclude those liabilities in the guise of the 'trade dispute' immunity.

According to Simpson, this is an area where 'legislation has been a significant influence on the expansion of economic tort liability in Britain'.[78] During expansionist periods of common law development of economic tort liability, especially from the mid-1960s onwards, Simpson attributes this to judicial motivations to outflank the statutory immunities in order to exert control over the direction of policy in the sphere of strike law.[79] Sometimes this judicial perception of policy was quite at variance with that of the democratically elected legislature, such as Lord Denning's infamous hostility to the legitimacy of secondary industrial action.[80] Simpson's analysis is compelling. Nevertheless, the strong influence of legislation on common law development of economic torts was in fact a product of a style of judicial reasoning that treated the common law question of tort liability as sequentially prior to and analytically distinct from the scope of the statutory immunity. Thus, while the legislation may have been influential, it operated invisibly on common law development, like a hidden mass exerting a gravitational pull on the

[74] See King's discussion of 'constitutional avoidance': King, *Judging Social Rights* (n 24) 299–300.
[75] *Gunton v Richmond-upon-Thames LBC* [1981] Ch 448 (CA).
[76] For an excellent critique of *Edwards*, see Catherine Barnard and Louise Merrett, 'Winners and Losers: *Edwards* and the Unfair Law of Dismissal' (2013) 72 CLJ 313.
[77] KW Wedderburn, *The Worker and the Law* (1st edn, Penguin 1965) 275.
[78] Bob Simpson, 'Trade Disputes Legislation and the Economic Torts' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart 2013) 107.
[79] ibid 128.
[80] Lord Denning was notoriously hostile to secondary industrial action, and this policy commitment infused the discharge of his judicial responsibilities in applying and developing the law. For a perceptive discussion, see Paul Davies and Mark Freedland, 'Labour Law' in JL Jowell and JPWB McAuslan (eds), *Lord Denning: The Judge and the Law* (Sweet and Maxwell 1984) 380.

common law. In fact, this entire area is a vivid manifestation of what Beatson has described as the 'oil and water' approach to common law and statute.[81]

An unlikely starting-point for this 'oil and water' thesis is *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*, which many writers regard as the golden highpoint of judicial abstentionism in the sphere of strike law.[82] The facts are well-known. The respondents, officials in the Transport and General Workers Union, acted in combination with the owners of mills on the island of Lewis to enforce a blockade of producers of tweed cloth who were undercutting the mill owners. The House of Lords concluded that the ingredients of the tort of conspiracy to injure had not been made out, because the predominant purpose of the combination was the legitimate promotion of the trade interests of those in combination; and that neither criminal nor tortious means had been employed to promote those interests. According to Simpson, in the *Crofter* case 'the Law Lords were aligning the common law with the legislative policy behind section 1 of the 1906 Act … It was clear that the policy behind the common law and the legislation was at the least very similar if not identical'.[83]

As an account of the unarticulated motivations of the judges in *Crofter*, Simpson's claim, though speculative, has some plausibility. Nevertheless, when one reads the judgments in *Crofter*, what seems most remarkable is the refusal to examine legislative policy in determining the contours of the conspiracy tort. Instead, the constituent elements of the tort are examined as an exercise in pure common law reasoning and through an exhaustive examination of the common law authorities. As such, what is remarkable about the *Crofter* case is the *irrelevance* of legislative policy to the determination of the common law liability in the judicial reasoning. While the substantive convergence between common law and legislative policy is unlikely to have been fortuitous, the common law judges ensured that the common law got to that destination guided by its own lights. Even in the most progressive of the speeches in *Crofter*, delivered by Lord Wright, his Lordship based the normative justification on the tenets of the common law itself:

> The common law in England might have adopted a different criterion and one more consistent with the standpoint of a man who refuses to benefit himself at the cost of harming another. But we live in a competitive or acquisitive society, and the English common law may have felt that it was beyond its power to fix by any but the crudest distinctions the metes and bounds which divide the rightful from the wrongful use of the actor's own freedom … If further principles of regulation or control are to be introduced, that is matter for the legislature.[84]

[81] J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 LQR 247.
[82] [1942] AC 435 (HL).
[83] Simpson (n 78) 114.
[84] *Crofter* (n 82) 472.

While this displays some constitutional sensitivity to the subordinate position of the common law judge, it neatly sidestepped the fact that statutory principles of regulation and control had *already* been introduced by the legislature in 1906. It would have been perfectly possible for Lord Wright to give those statutory principles explicit force in shaping and constraining common law development in *Crofter*. Yet it is surely significant that Lord Wright preferred to base his reasoning within the normative compass of the common law and its model of the 'acquisitive society'.

It is conventional to identify the rupture in judicial policy on strike action to 1964, and the House of Lords' momentous decision in *Rookes v Barnard*.[85] Certainly, *Rookes* marked the transition from an 'abstentionist' to an 'interventionist' common law in strike law. Nevertheless, the move from *Crofter* to *Rookes* was in fact less remarkable than has been supposed. Certainly, there were discontinuities on the surface. *Crofter* worked with the grain of legislative policy, whereas *Rookes* marked something of a constitutional revolt by the judges in developing the economic torts in defiance of legislative policy. However, in terms of *styles of judicial reasoning*, there were in fact strong continuities between *Crofter* and *Rookes* in the propensity of the judges to deal with the relevant tort issues as matters of pure common law, to be determined within the four corners of existing common law authority. While it is putting the point too strongly to suggest that *Crofter* sowed the seeds for *Rookes*, the marked failure in *Crofter* to integrate legislative policy explicitly into the common law reasoning process left the common law vulnerable to precisely the kind of expansionism that followed in the decades after 1964.

In *Rookes v Barnard*, trade unionists secured the lawful dismissal of a non-unionist in a closed shop context. Mr Rookes was suspended and then subsequently dismissed as a consequence of strike threats by his fellow employees. It was conceded that such threats were threats to breach the contract of employment. Mr Rookes successfully sued for damages for the tort of intimidation. The question for the House of Lords was whether there was such a tort at common law and, if there was, whether it was within the scope of the statutory immunity in the 'trade dispute' defence.

The speeches in the House of Lords adopted a sequential approach to the legal analysis. The question whether the tort had been committed at common law was logically prior to and severable from the enquiry into whether the statutory immunity was applicable. Once the case reached the House of Lords, the principal controversy at common law was not whether the tort of intimidation existed, but whether it extended beyond threats to commit crimes and torts to a threat to break a contract. For many of their Lordships, that was treated as a matter to be determined within the logic of common law analysis. Thus, Lord Reid observed that:

> Threatening a breach of contract may be a much more coercive weapon than threatening a tort, particularly when the threat is directed against a company or corporation, and, if

[85] [1964] AC 1129 (HL).

> there is no technical reason requiring a distinction between different kinds of threats, I can see no other ground for making any such distinction.[86]

There was of course a compelling 'technical' reason to draw the line at threats to commit a tort, which was that extending the tort of intimidation in this way outflanked the statutory immunity and extinguished the liberty to strike.

Lord Evershed came closer to acknowledging the constitutional character of the common law determination but drew back from the force of its implications:

> I cannot find, in accordance with logic, reason or common sense, anything between threats to do tortious or criminal acts, on the one hand, and threats to break contracts … It is no doubt true that in attempting to extract the principle from the present case there is some obscurity caused by the circumstances with which we are concerned, that is, first, the actual nature of the alleged threats and, second, by the presence in the background of the Trade Disputes Act, 1906.[87]

To avoid contaminating the common law analysis with the 'background' of the trade dispute legislation and the wider industrial relations context, his Lordship engaged in a casuistic consideration of problems in landlord and tenant law to fortify his conclusion that the tort of intimidation encompassed a threat to break a contract.

In retrospect, the judicial refusal to acknowledge the profound consequences of the holding in *Rookes v Barnard* for the right to strike, and the refusal to expose common law reasoning to the statutory context, is rather staggering. The case came as close as a labour law case might to precipitating a constitutional crisis between Parliament and the courts. It must therefore be acknowledged that Lord Devlin was brave enough to address this constitutional difficulty head on, in his recognition that 'the strike weapon is now so generally sanctioned that it cannot really be regarded as an unlawful weapon of intimidation; and so there must be something wrong with a conclusion that treats it as such'.[88] As he recognized, one possibility would have been to confine the tort of intimidation to threats to commit a tort, excluding threats to breach a contract from the scope of illegality, so as to preserve the evident legislative policy in favour of a protected liberty to strike. This had obviously attracted the Court of Appeal in reaching its conclusion that intimidation did not extend to threats to break a contract.

Ultimately, however, Lord Devlin deprecated any attempt to 'hobble the common law' or even 'to cripple the common law' by confining the tort artificially in the light of the statutory context.[89] Admittedly, Lord Devlin was alive to the constitutional problem:

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[86] ibid 1169.
[87] ibid 1186–87.
[88] ibid 1218.
[89] ibid 1218–1219.

> For the universal purposes of the common law, I am sure that that is the right, natural and logical line. For the purpose of the limited field of industrial disputes which is controlled by statute and where much that is in principle unlawful is already tolerated, it may be that pragmatically and on grounds of policy the line should be drawn between physical and economic pressure. But that is for Parliament to decide.[90]

Yet Lord Devlin went on to endorse a great judicial interference in a matter of policy that was properly within the province of Parliament. The damaging effects of *Rookes* required an urgent legislative response extending the statutory immunity to encompass the new tort of intimidation.[91] We cannot be so sure that such a legislative response would be forthcoming if *Rookes* was handed down today.

Later judgments have been rather more inclined to restrain the development of the economic torts. The leading case is now *OBG Ltd v Allan* where the House of Lords took an uncharacteristically restrained approach to the rationalization and limits of the economic torts in the English common law.[92] As Wedderburn has pointed out, it is perhaps not a coincidence that this ethos of restraint occurred within the context of a commercial rather than an industrial dispute.[93] Approving Lord Hoffmann's reasoning in *OBG*, Lady Hale invoked the constitutional context to labour disputes as a further justification for the limiting of liability for economic torts, and its consistency—

> … with legal policy to limit rather than to encourage the expansion of liability in this area. In the modern age Parliament has shown itself more than ready to legislate to draw the line between fair and unfair trade competition or between fair and unfair trade union activity. This can involve major economic and social questions which are often politically sensitive and require more complicated answers than the courts can devise. Such things are better left to Parliament.[94]

This is an important statement of constitutional principle. Where sensitive political issues are involved, such as setting the limits of lawful strike action, the courts should operate as subsidiary constitutional actors. Such issues will display a high degree of polycentricity and will often involve highly charged political questions concerning the appropriate distribution of social and economic power. The adjudication of the merits of specific industrial disputes is also liable to bring the courts into disrepute, at least with the side that loses. While the neutrality of the common law in the employment sphere is no doubt little more than a comforting illusion at the best of

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[90] ibid 1220.
[91] Trade Disputes Act 1965, s 1.
[92] [2007] UKHL 21, [2008] 1 AC 1.
[93] Lord Wedderburn, 'Labour Law 2008: 40 Years On' (2007) 36 ILJ 397, 409.
[94] *OBG* (n 92) [306].

times, the partiality is particularly stark when judges are invited to take sides in a legal dispute arising out of a strike. Wedderburn, perhaps uncharitably, described Lady Hale's constitutional position as 'another brick in the wall built by the decision in *Johnson v Unisys*'.[95] From another perspective, we might regard *OBG* and *Johnson* as welcome bricks in the wall to stand in the way of another *Rookes*.

Have we now reached a position where the trade dispute immunity can be regarded as a 'pre-emptive' statute that has occupied the field of strike law, with *OBG* mirroring the constitutional restraint of *Johnson*? Such a conclusion would be premature, despite the advance marked by *OBG*. First, even some of the most progressive judgments in strike law have been beset by a tendency to continue regarding the common law and statute as 'oil' and 'water'. Thus, Lord Scarman's speech in *Duport Steels Ltd v Sirs* is in many ways a *tour de force* of judicial minimalism.[96] After drawing a contrast between 'justice' and 'justice according to law' in admonishing Lord Denning's extraordinary misuse of judicial interpretive powers in the Court of Appeal, he observed:

> The common law and equity, both of them in essence systems of private law, are fields where, subject to the increasing intrusion of statute law, society has been content to allow the judges to formulate and develop the law … But in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments.[97]

Thus, statute is still an 'intrusion' on the common law, and in constitutional terms, common law and statute are still running in separate streams. While this curtails the deliberate manipulation of statutes through eccentric statutory interpretations to further judicial policies on strike law, in the style of Lord Denning at his creative worst, it contemplates no brake on creative expansion of economic torts at common law in deference to the legislative policy expressed in statutes such as the trade dispute defence.

The second ground for caution is prompted by the remarkably candid extra-judicial reflections of Lord Hoffmann on the role of the economic torts in strike disputes. In reflecting on *Rookes*, Lord Hoffmann observed that the 1960s and 1970s were beset by 'excessive use of trade union power, often by small factions within the unions' and this 'had alienated the judges and eventually the public'.[98] Lord Hoffmann regarded it as a particular virtue of *Rookes* that 'this new tort had the advantage of not being protected by the 1906 Act'.[99] For Lord Hoffmann, this growth in unchecked trade union power led to its unrestrained abuse. It was a consequence of an 'experiment in total *laissez faire* … based on the social theories of Professor Otto Kahn-Freund, a

[95] Wedderburn, 'Labour Law 2008' (n 93).
[96] [1980] 1 WLR 142 (HL).
[97] ibid 168.
[98] Leonard Hoffmann, 'The Rise and Fall of the Economic Torts' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters 2011) 112.
[99] ibid.

refugee from the Nazis … I remember him at Oxford, a most learned, gentle and charming man who did more damage to the United Kingdom than any German since Hitler'.[100]

It is not the occasion to deconstruct this tin-eared presentation of labour history. There was never 'total' *laissez-faire*. Strike action was always subject to the limits of the statutory trade dispute formula. Indeed, the idea of 'total' *laissez-faire* is barely coherent given that even free markets have legal limits defined by the laws of contract, tort and property. Nor was it an 'experiment': there was no dastardly and reckless blueprint. The structure reflected a highly complex evolutionary pattern formed by the interaction between social forces and the political system over centuries. Kahn-Freund was an interpreter of that pattern, a legal sociologist, *not* its architect. For Lord Hoffmann, the Conservative governments during the 1980s implemented the necessary statutory reforms to ban secondary industrial action and impose secret ballots on trade unions: 'Parliament has taken over the task of delimiting what industrial action should be lawful or unlawful'.[101] This has removed the need for expansively developed economic torts, providing judges with new techniques of control through the tools of statutory interpretation. Nevertheless, the subtext is clear. While Parliament has for now 'taken over' the task of control from the judiciary, the judiciary may be prepared to renew their acquaintance with the economic torts if Parliament decides to reverse its statutory restrictions. In this way, *OBG* may represent judicial 'deference', but it is deference on the common law's own terms rather than deference guided by respect for legislative supremacy. In terms of judicial personalities, Lord Hoffmann occupies an ambivalent position in the unfolding story of the common law's encounter with legislation, hero in *Johnson* and villain in *OBG*. It is perhaps not entirely coincidental that this corresponds to the distinction between 'individual' and 'collective' labour law, with common law mischief arising in the latter domain.

## IV Statute as an Analogical Stimulus of Common Law Development

In *Johnson* Lord Hoffmann referred approvingly to legislation as a source of analogical principle for common law development.[102] There are two main contexts where this analogical development of common law appears to have been prompted by statute: the emergence of the implied term of mutual trust and confidence; and the development of a 'purposive' approach to the contractual tests for identifying 'worker' and 'employee' for the purposes of claiming statutory employment rights. In each case, despite the superficial importance of statute in triggering the common law development, the encounter between statute and common law has been shallow rather than deep.

The implied term of mutual trust and confidence is now an integral element of personal work contracts. The adjudicative context for its initial emergence was the complex body of law on

[100] ibid.
[101] ibid 113.
[102] *Johnson* (n 5) [35]–[36].

constructive dismissal.[103] This concept extended dismissal to include termination of the contract by the employee 'in circumstances in which he is entitled to terminate it by reason of the employer's conduct'.[104] This necessitated a legal formulation of an employee's 'entitlement to terminate' the employment contract. The courts adopted a contractual test of repudiatory breach.[105] This triggered 'a process of formulation of implied terms, which were in effect back-formations, in the sense that they were terms the breach of which would amount to expulsive or repudiatory conduct sufficient to constitute constructive dismissal by the employer'.[106] The elaboration of these behavioural standards of employing entities came to be rationalized through the implied term of mutual trust and confidence in *Courtaulds Northern Textiles Ltd v Andrew*, which became a central tenet of the law of constructive dismissal.[107]

In this sense, then, the statute played a pivotal role in triggering the emergence of the implied term, through the statutory concept of constructive dismissal. It would be going too far to suggest that the development of trust and confidence represents:

> [T]he kind of 'blind legal evolution' which may occur as a result of the interaction of statute in the common law, in an area where statute draws heavily on the common law for its own conceptual structure. Through a series of 'loops', the philosophy and perspectives of the legislation have fed back into the common law, and *vice versa*.[108]

In fact, the leading appellate decisions on the implied term have conceptualized it as a common law development, supported principally by internal common law reasoning. While legislation might have triggered the normative elaboration of the implied term, this elaboration has been developed principally through distinctive forms of common law reasoning rather than by analogy with statute.

The leading case on the implied term is still the House of Lords decision in *Malik v BCCI*.[109] This decision confirmed the existence of the implied term. In *Malik*, the implied term would give rise to a claim for stigma damages in a situation where the employing bank had been operating a corrupt and dishonest operation and the employees had suffered reputational damage affecting their future employability as a result of the employer's breach. The two lead judgments were delivered by Lord Nicholls and Lord Steyn. Both of them were exercised by the difficulty posed by *Addis v Gramophone Co Ltd*, which restricted the recoverability of stigma damages

[103] This discussion draws upon collaborative work undertaken with Mark Freedland on wrongful dismissal: see Alan Bogg and Mark Freedland, 'The Wrongful Termination of the Contract of Employment' in Mark Freedland and others (eds), *The Contract of Employment* (OUP 2016).
[104] Originally the Trade Union and Labour Relations Act 1974, sch 1, para 5(2)(c), now ERA 1996, s 95(1)(c).
[105] *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 (CA).
[106] Freedland, *The Personal Employment Contract* (n 14) 155.
[107] [1979] IRLR 84 (EAT).
[108] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005) 299–300.
[109] *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 (HL).

consequent on dismissal.[110] This is important in understanding the specific role of statutory analogies in both judgments.

Lord Nicholls referred approvingly to the development of the implied term as a fact of modern employment law. It reflected the fact that 'Employment, and job prospects, are matters of vital concern to most people … An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable'.[111] This contributed to the shift in judicial perspective on the special nature of the employment contract, and the role of trust and confidence in controlling abuse of power. Yet strikingly none of this is attributed to the growth in influence of *statutory* rights. Lord Nicholls invoked the statutory analogy, specifically the availability of compensation for economic loss brought about by reputational damage caused by the manner and circumstances of a dismissal, in arguing against the artificial restrictions imposed by *Addis* on the application of 'ordinary contractual principles'.[112] In other words, the statutory analogy is focused on a narrow remedial point, and it is invoked in order to justify the restoration of ordinary contractual principles governing contractual damages. The statutory analogy does not inform the developing substantive content of the implied term.

Similarly, Lord Steyn explained the origins of the implied term in the common law itself: 'The evolution of the term is a comparatively recent development. The obligation probably has its origin in the general duty of co-operation between contracting parties'.[113] Significantly, Lord Steyn referred to a 'change in legal culture' underpinning the implied term.[114] Yet this 'change in legal culture' was a change in *common law* legal culture. Thus, Lord Steyn referred approvingly to the decisions in *Spring v Guardian Assurance Plc*[115] and *Scally v Southern Health and Social Services Board*[116] as evidence of this legal evolution. Yet both *Spring* and *Scally* were classic common law decisions. *Spring* was concerned with the negligence liability of providers of references, and involved an incremental extension of *Hedley Byrne* liability.[117] *Scally* was concerned with the implication of a contractual term to the effect that an employer was under a duty to notify the employee of certain contractual benefits. In neither case was the wider context of statutory employment protection relevant in shaping the legal reasoning in those decisions. It is true that Lord Steyn concluded that:

> The principled position is as follows. Provided that a relevant breach of contract can be established, and the requirements of causation, remoteness and mitigation can be

[110] [1909] AC 488 (HL).
[111] *Malik* (n 109) 37G-H.
[112] ibid 39D-F.
[113] ibid 45H.
[114] ibid 46B.
[115] [1995] 2 AC 296 (HL).
[116] [1992] 1 AC 294 (HL).
[117] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL). Lord Woolf took the view (at 341) that the legal analysis of the liability issue in *Spring* would have been identical regardless of whether the claimant was an employee or engaged under a contract for services.

> satisfied, there is no good reason why in the field of employment law recovery of financial loss in respect of damage to reputation caused by breach of contract is necessarily excluded. *I am reinforced in this view* by the consideration that such losses are in principle recoverable in respect of unfair dismissal: see section 123(1) Employment Rights Act 1996; *Norton Tool Co. Ltd. v. Tewson* [1973] 1 W.L.R. 45, 50–51.[118]

It is nevertheless revealing that the statutory analogy was directed at the restoration of 'classic contract law principles' of the kind that had been distorted by *Addis*,[119] and that the statutory material merely 'reinforced' the position that Lord Steyn had already reached through ordinary common law reasoning.

In *Johnson* Lord Hoffmann was explicit in linking the normative transformation of the contract of employment as a common law institution to the influence of statutory employment protection,[120] though he did so in the context of upholding the statute's pre-emptive effect on common law development of the implied term. More interesting, perhaps, was Lord Steyn's judgment in *Johnson*, given that Lord Steyn rejected the conclusion of the majority on statutory pre-emption. Once again, Lord Steyn drew principally upon the common law authorities of *Scally* and *Spring* to justify the proposition that the underlying judicial philosophy of the employment contract had shifted to encompass a concern for the 'physical, financial and even psychological welfare' of employees.[121] In terms of the background statutory context, however, Lord Steyn placed great emphasis on the statutory *deregulation* of employment protection as the impetus for common law development.[122] In this way, it was the retreat of legislation that prompted common law development. Contractual protection—

> … is particularly important in the light of the greater pressures on employees due to the progressive deregulation of the labour market, the privatization of public services, and the globalization of product and financial markets … The need for protection of employees through their contractual rights, express and implied by law, is markedly greater than in the past.[123]

This provides a powerful counterpoint to Lord Hoffmann's judgment. Ultimately, Lord Steyn's theory of the judicial role, when applied to the particular facts in *Johnson*, runs into the problem that statutory pre-emption was constitutionally compelling for the reasons already outlined in section III. In other contexts, however, Lord Steyn's theory may have greater relevance so that parliamentary inaction or hostility to workers' interests should prompt an assertive common law

[118] *Malik* (n 109) 52G–H (emphasis added).
[119] ibid 47C.
[120] *Johnson* (n 5) [35].
[121] ibid [18], referring to Lord Slynn's dicta in *Spring*.
[122] ibid [19].
[123] ibid.

response. A rationale that keeps common law activism within appropriate bounds would be the protection of fundamental rights at common law. We return to this possibility in the next section.

The second area in which there is an interaction between statute and common law is in the legal characterization of personal work relations. It is here that the 'hybridity' of employment law is at its strongest. Statutory employment rights are allocated to different types of personal work contract. Some rights are confined to the narrow category of 'employees' working under a contract of employment, such as the right not to be unfairly dismissed. Other rights are allocated more widely to the category of 'worker', as under the national minimum wage and working time protections. The tests for identifying 'employees' and 'workers' are regarded fundamentally as common law tests, and the courts have developed complex common law criteria for determining the appropriate characterization of personal work relations. One of the principal regulatory difficulties faced by the courts is the disjunction between the written contractual documentation and the factual reality of the day-to-day working relationship. The written documentation, which is increasingly standard form contractual boilerplate, may be designed to manufacture the appearance of a legal relationship of self-employment through its construction of contractual terms. The factual reality is the parties behave as if the legal relationship was one of employment.

In *Byrne Bros (Formwork) Ltd v Baird* the written contract characterized the individuals as self-employed carpenters.[124] The individuals issued claims for holiday pay under the working time legislation on the basis that they were 'workers' and thus entitled to the right to paid annual leave. In upholding the claim, Underhill J adopted what could be described as a 'purposive' approach. In extending the scope of working time protections to 'workers', he observed that:

> It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b) ['worker']. That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection … Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services—but with the boundary pushed further in the putative worker's favour.[125]

What is 'purposive' about this approach is its identification of the legislative policy underlying the introduction of the 'worker' category—the extension of statutory protection—which then informs the application of the relevant indicative factors under the common law test for 'worker'. This provides a neat example of a legislative policy expressed in a statute being used to shape the development of a common law test.

The highpoint of this 'purposive' approach was reached in the Supreme Court decision in *Autoclenz Ltd v Belcher*.[126] In *Autoclenz* the car valeters signed comprehensive written contracts

[124] [2002] ICR 667 (EAT).
[125] ibid [17].
[126] [2011] UKSC 41, [2011] ICR 1157.

that contained 'terms inconsistent' with employment status. If those written terms were contractually valid, the effect would be to negate a legal characterization that the car valeters were 'employees' or 'workers'. This would disqualify the individuals from bringing statutory claims under the working time and minimum wage legislation. The written contracts had been signed, which as a matter of ordinary contract law is generally dispositive: a signatory to a written contract is bound to its terms.[127] Taking its inspiration from landlord and tenant law and the problem of 'sham' arrangements, contexts that led to 'the courts concluding that relevant contractual provisions were not effective to avoid a particular statutory result',[128] the Supreme Court determined that the written documentation was *not* the same as the 'true agreement'.[129] In an important statement of principle, Lord Clarke SCJ concluded that:

> [T]he relevant bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.[130]

This enabled tribunals to disregard 'terms inconsistent' with employee or worker status in the written documentation if those terms did not reflect the reality of the working arrangements. What is the significance of *Autoclenz* in understanding the interaction between statute and common law? From a constitutional perspective, Kavanagh has argued that:

> Law-making is a collaborative enterprise … In this enterprise, the legislature plays to lead role and the courts have a supporting role, assisting the legislature in the implementation of its laws whilst being prepared to stand up for certain values and principles in the appropriate case.[131]

*Autoclenz* represents this collaborative conception of the court's role, developing the common law tests for 'employee' and 'worker' in support of a general legislative policy of worker protection. It is therefore fair to say that 'although the statutory context was not discussed in any detail in *Autoclenz*, it was arguably highly influential'.[132] The extent to which this 'purposive' approach has been stable and enduring is questionable, with later cases adopting a more traditional contractual approach to the legal characterization of personal work relations.[133] This instability is

[127] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 (KB).
[128] *Autoclenz* (n 126) [24].
[129] ibid [35].
[130] ibid.
[131] Aileen Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016) 139–140.
[132] ACL Davies (n 4) 85.
[133] *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735, [2013] IRLR 99.

being engendered by the ambiguities surrounding the concept of 'purposive' in this context. In *Byrne Bros*, 'purposive' referred to a relatively clear legislative policy underlying the statutory concept of 'worker'. Yet *Autoclenz* was also addressing the concept of 'employee', and here the legislative policy underlying the category of 'employee' is far less clear-cut. So we are left with a puzzle about 'purposive' that was never resolved by Lord Clarke SCJ: whose purpose? The court, the contracting parties, or Parliament? And to what end? In the next section, we suggest that the common law protection of fundamental rights provides an interpretive framework for the *Autoclenz* 'purposive' approach that provides it with the necessary certainty and stability.

## V Common Law Protection of Fundamental Rights

According to Lord Hoffmann:

> Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. *Subject to observance of fundamental human rights*, the point at which this balance should be struck is a matter for democratic decision.[134]

This proposition appears to envisage a limit to the 'primacy of statute', in recognizing the independent role of the common law in protecting fundamental rights. The notion of fundamental rights at common law has attracted increasing judicial and scholarly interest, which may reflect wider anxieties about the repeal of the Human Rights Act 1998 and the prospect of a 'Brexit' from the European Convention on Human Rights.[135] This gives the enquiry into the common law's capacities to protect fundamental rights an urgent practical significance. The position of fundamental rights at common law is controversial amongst employment lawyers, not least because of the functionalist's reservations about the repressive effects of the common law and the concerns about judicial impartiality in legal disputes between employers and workers. Nevertheless, those concerns may now be matched or even surpassed by the worry that neo-liberal governments pose an even greater threat to workers' rights through oppressive legislation. Given the changing constitutional context to worker protection, employment lawyers should now be prepared to engage with the common law fundamental rights paradigm. In assessing the prospects for a common law jurisprudence of fundamental rights, there are five main issues.

First, which rights count as common law fundamental rights? Unlike a written constitution or international treaty, where there is an authoritative text that structures legal reasoning, the basic question of whether a particular right is protected at common law is often politically and legally contested. Historically, employment lawyers were concerned that common

[134] *Johnson* (n 5) [37] (emphasis added).
[135] For an excellent recent discussion, see Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68 *Current Legal Problems* 85.

law fundamental rights were really 'employers' fundamental rights' such as private property and freedom of contract.[136] As case law has developed, certain rights such as freedom of expression and access to a court have now been recognized as fundamental rights at common law.[137] Other scholars have gone further in suggesting that 'fundamental freedoms of speech, conscience, and association, together with the right to a fair trial and immunity from arbitrary arrest and detention, are integral parts of any legitimate regime'.[138] Increasingly, international law has been identified as an interpretive anchor for common law fundamental rights, so that the common law is developed to ensure compliance with the UK's international treaty obligations.[139] This is also true of customary international law.[140] While it may be difficult to argue that common law rights and Convention guarantees are now co-extensive,[141] the permeability of the common law to the influence of international human rights law gives the common law radical potential. This permeability also limits the concerns with an unrestrained judicial creativity, by exposing the common law to the expertise of international bodies concerned with fundamental human rights norms.

Secondly, what of the content of those fundamental rights? Fundamental rights are usually framed at a high degree of abstraction. Determining the application of those abstract rights in particular cases may invite a high degree of judicial law-making power, and a 'transfer of law-making power from legislature to the courts'.[142] The effect of this might be to turn what is really a political question into a legal question, to be determined by an unelected and democratically unaccountable judiciary.[143] It is possible to get beyond this rather stark zero-sum conception of the constitutional relationship between the court and the legislator. For example, Allan has suggested of fundamental common law rights 'that their precise specification depends on positive law and thereby conceding space for legislative initiative'.[144] This suggests an important way in which legislation might interact with the common law, with statute operating as a kind of *determinatio* to fill out the specific content of the common law fundamental rights, where there are reasonable and incommensurable alternatives for specification.[145] This also provides a way of reconciling common law fundamental rights with the democratic virtues of legislation in a parliamentary democracy.

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[136] Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75 CLJ 86, 87.
[137] On the right of access to a court, see *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB). On the right to freedom of expression, *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL).
[138] Allan, *The Sovereignty of Law* (n 19) 324.
[139] For discussion, see Eirik Bjorge, 'Common Law Rights: Balancing Domestic and International Exigencies' (2016) 75 CLJ 220. For a recent example in labour law, where the Supreme Court developed the public policy of illegality in the light of the United Kingdom's treaty obligations to protect the victims of trafficking, see *Hounga v Allen and another* [2014] UKSC 47.
[140] ibid 238.
[141] Elliott (n 135) 11.
[142] Sales (n 136) 92.
[143] See JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1.
[144] Allan, *The Sovereignty of Law* (n 19) 324.
[145] On the idea of *determinatio*, developed most extensively by scholars working the Thomist tradition of natural law theory, see Robert P George, 'Natural Law and Positive Law' in Robert P George (ed), *The Autonomy of Law: Essays on Legal Positivism* (OUP 1996).

Thirdly, Craig has identified 'autochthony' as an important dimension in developing the analytical framework for fundamental rights.[146] This refers to 'the descriptive and normative ideal of attachment to indigenous or native values'.[147] Within the context of common law fundamental rights, this concerns the extent to which domestic courts can develop common law fundamental rights so as to depart from the formulation of human rights at the international level. As Craig suggests, there is an attraction in the view that the ECHR provides a *floor* of protection, thereby permitting domestic courts to develop higher levels of protection through the common law.[148] This allows for domestic judicial creativity, whilst avoiding the unappealing scenario of the common law protection deviating from a civilized international consensus on the basic threshold of rights protection. Moreover, the development of fundamental rights in international law is often characterized by a high level of abstraction and generality. 'Subsidiarity' is now a watchword of international human rights law, envisaging a vital role for national institutions in defining, developing and implementing human rights protections in ways that are sensitive to local conditions. Nevertheless, the guidance of international human rights law in the judicial development of common law norms provides legitimacy to the court's interpretive role.[149]

Fourthly, Sales has drawn attention to the muted role of common law fundamental rights in private law, as compared with public law.[150] At least part of the explanation lies in the fact that 'The distribution of entitlements in that field reflects a precise balancing of interests worked out through time … in the course of which underlying values have been gradually absorbed into positive legal rules'. Fundamental rights have tended to be more concerned with the vertical relationship between State and citizen, rather than the horizontal relationship between private citizens.[151] Employment law disrupts this distinction between the vertical and the horizontal. The employment relationship creates a situation where it is possible for 'abuse of power' to occur, and this engages the common law constitution's concern to restrain abuse of power in the employment relation.[152] This provides a justification for treating the domain of employment law as especially amenable to the development of common law fundamental rights jurisprudence, given its normative affinities with public law.

Finally, in what ways might the underlying distribution of entitlements by common law and statute be reshaped by fundamental rights jurisprudence? It is easier to imagine the ways in which common law fundamental rights jurisprudence might inform the development of public law, such as a reshaping of the ultra vires doctrine or the development of a proportionality standard for judicial review.[153] The integration of fundamental rights into the doctrinal apparatus

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[146] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 272.
[147] ibid.
[148] ibid 275. See further Richard Clayton, 'Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law' [2012] PL 639 and Eirik Bjorge, 'The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence' (2013) 72 CLJ 289.
[149] Sales (n 136) 101.
[150] ibid 107.
[151] ibid 87.
[152] John Laws, 'Public Law and Employment Law: Abuse of Power' [1997] PL 455.
[153] Elliott (n 135) 13–19.

of private law is less straightforward. I will address two areas where the judicial development of the interrelationship between common law and statute might be enriched by an engagement with fundamental rights jurisprudence. The first area concerns the development of a common law individual right to strike, and the balance between common law and legislative development in shaping an individual right to strike. The second area concerns some recent variations on the *Autoclenz* problem, and judicial attempts to align the development of common law tests for personal work relations with the protective scope of legislation.

## The Right to Strike and the Common Law

The boldness of the English courts in expanding tort liability for strike organizers has only been surpassed by the timidity of English courts in refusing to develop a doctrine of contractual suspension for individual strikers. It is now regarded as settled law that a complete withdrawal of labour will usually constitute a repudiatory breach of the employment contract. This has been the case since the Employment Appeal Tribunal (EAT) decision in *Simmons v Hoover Ltd*,[154] where Philips J rejected the argument that the contract of employment should be regarded as suspended during strike action. The argument that the contract of employment was suspended rather than breached was based upon the earlier Court of Appeal authority of *Morgan v Fry*, where Lord Denning developed the notion of a common law *right* to strike.[155] It was implicit in Lord Denning's reasoning that the doctrine of contractual suspension was the logical corollary of a right to strike.[156] The suspension analysis also attracted the support of Davies LJ in *Morgan*, though it quickly disappeared from view in the English common law. Paradoxically, perhaps, the approach in *Morgan* attracted forceful criticism from labour lawyers sympathetic to the protection of a wide liberty of strike action for trade unions and workers. For example, Lord Wedderburn described Lord Denning's intervention as a 'well intentioned innovation' but one that was beset by a host of definitional difficulties.[157] He concluded that 'none of the modern cases doubt that the answer in *Simmons* was correct … The common law, built on the very pillars of property and contract, cannot accommodate a *right* to strike'.[158] The reluctance of the employment lawyers to embrace *Morgan* was no doubt driven by deep functionalist hostility to the common law and the limits of common law adjudication in the politically sensitive area of strike disputes.

Shortly after *Morgan* had been handed down, the Donovan Commission set itself against a doctrine of contractual suspension.[159] The complex and controversial matters of policy that would require resolution in the implementation of a doctrine of suspension were not amenable to judicial resolution, and it was unlikely that even Parliament was up to the task of fixing upon a workable definition of such matters. The Donovan recommendations reflected a determined

[154] [1977] QB 284 (EAT).
[155] [1968] 2 QB 710 (CA).
[156] ibid 725.
[157] Wedderburn, *The Worker and the Law* (n 28) 192.
[158] ibid 193.
[159] Royal Commission on Trade Unions and Employers' Associations 1965–1968, *Report* (Cmnd 3623, 1968) paras 943–45 (Donovan Report).

preference to re-establish a philosophy of judicial abstention in industrial disputes. The judgment in *Simmons* was sympathetic to this philosophy. In rejecting the suspension theory, Philips J was certainly apprised of the Donovan recommendations. While formally basing his decision not to adopt Lord Denning's analysis on the highly unusual historical context to *Morgan*, decided in the afterglow of *Rookes*, Philips J developed a line of reasoning that relied heavily on the primacy of legislation and the need for judicial abstention. He noted that, in the legislation of the social contract period, the availability of some statutory rights was 'severely curtailed' during strike action.[160] Furthermore, the complexities of suspension meant that legislation would be required to implement it, rather than the more incremental technique of common law adjudication.[161] The whole area 'is essentially one of industrial policy, and beyond our competence to determine'.[162]

The determination of a 'right to strike' is a matter of deep normative controversy. In this respect, the judicial self-restraint in *Simmons* reflected legitimate concerns about the role of the judiciary in making those controversial policy choices, and a constitutional preference for the democratic process of legislative enactment. It is possible for courts to be sensitive to those institutional concerns, however, whilst developing a common law right to strike. First, the right to strike is supported by international treaty obligations and customary international law.[163] The norms of international human rights law provide a source of principles to identify areas of consensus on the core elements of a right to strike that might inform the development of common law principles.[164] Secondly, concerns about 'autochthony' are mitigated by the patterns of diversity in national practices on the right to strike. This leaves significant latitude to national institutions in developing a right to strike within wide parameters of national cultural difference. Despite this legitimate variability, there are 'behind the kaleidoscope of institutions … common standards or ambitions'.[165] According to Wedderburn, the 'central peculiarity is the dominant precept that workers who take strike action or other industrial action normally act in breach of their employment contracts'.[166] The doctrine of contractual suspension therefore lies at the hard minimal core of what might be expected of a right to strike at common law.

Finally, this might be a context where the common law evinces respect for the abstract right to strike as a fundamental right, whereas legislation specifies the detail of its implementation. One of the historical concerns with a doctrine of contractual suspension was the judicial specification of its limits: did it apply to 'unofficial' industrial action? Did it apply where industrial action was in breach of a procedure agreement? To all forms of industrial action or just complete cessations of labour? These were sensitive matters of policy not apt for resolution by an

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[160] *Simmons* (n 154) 296.
[161] ibid 298.
[162] ibid 304.
[163] For comprehensive discussion of the international law context, see International Trade Union Confederation, 'The Right to Strike and the ILO: The Legal Foundations' (March 2014), available at <http://www.ituc-csi.org/IMG/pdf/ituc_final_brief_on_the_right_to_strike.pdf>
[164] For discussion, see Bogg, 'The Hero's Journey' (n 7) 345–46.
[165] Lord Wedderburn, 'The Right to Strike: Is there a European Standard?' in Lord Wedderburn, *Employment Rights in Britain and Europe: Selected Papers in Labour Law* (Lawrence & Wishart 1991) 276, 334.
[166] ibid 283–284.

unelected judiciary. We now have a statutory concept of 'protected' industrial action under the Trade Union and Labour Relations (Consolidation) Act 1992, s 238A, to the effect that it is automatically unfair to dismiss an employee if the reason for dismissal is that the employee participated in 'protected' industrial action. The industrial action is 'protected' if 'he commits an act which, or a series of acts each of which, he is induced to commit by an act which by virtue of section 219 is not actionable in tort'. This establishes a link between the scope of unfair dismissal protection and the lawfulness of industrial action at the collective level (the action must be authorized or endorsed by the union; it must be a trade dispute; the relevant procedural constraints must be satisfied; and so forth). It is a small step to link the scope of contractual suspension to the statutory parameters of 'protected' industrial action under section 238A. This ensures that the courts protect the abstract right to strike at common law, whereas Parliament determines the controversial policy matters that frame the detailed scope of contractual suspension. This reflects the kind of collaborative engagement between courts and the legislature on display in *Autoclenz*, and the scope for fertile interaction between common law and legislation in the specification of fundamental rights.

## The Personal Scope of Fundamental Rights

In *Bates van Winkelhof v Clyde & Co LLP* the Supreme Court was concerned with whether a partner in a Limited Liability Partnership (LLP) fell within the scope of the 'worker' category, which would permit her to proceed with a statutory claim for whistleblowing protection.[167] The Supreme Court concluded that she was a 'worker'. Lady Hale SCJ emphasized the need to apply the unvarnished statutory wording in ERA 1996, s 230(3)(b),[168] namely work undertaken under:

> … any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

Given the solicitor's integration into the business, and given that Clyde & Co did not relate to her as a client or customer, she was a worker and hence within the scope of the statutory whistleblowing protection. Lady Hale SCJ then considered the extent of the claimant's protection under Article 10 of the European Convention on Human Rights, given the special importance of whistleblowing protection under the Convention's freedom of expression provision. Since she was a worker on a straightforward application of the statutory test in section 230, she did not proceed to consider the effect of the interpretative obligation under section 3 of the Human Rights Act 1998.

[167] [2014] UKSC 32, [2014] 1 WLR 2047.
[168] ibid [39].

The outcome in *Bates van Winkelhof* is undoubtedly correct, and the route to the outcome has the attraction of simplicity. Nevertheless, it represents a missed opportunity to clarify the role that common law fundamental rights might play in developing the categories of personal work. The idea that there is a simple unvarnished meaning of a statutory provision, with linguistic interpretation detached from constitutional context, is unhelpful. Indeed, the very idea of an 'ambiguity' in a statutory formula is itself a controversial interpretive matter.[169] The meaning of statutes must be determined through a complex interpretive exercise, constructing the textual meaning and legislative purposes in the light of background constitutional concepts.

The statutory protection of whistleblowing, accorded to 'workers', engages two fundamental rights at common law. Most obviously, it is concerned with the protection of freedom of expression in the workplace. The prior jurisdictional matter of identifying a 'worker' is also concerned with the fundamental right of access to a court. It should be remembered that disputes about personal work status are usually disputes about the jurisdiction of the tribunal to consider the merits of the substantive statutory claim. If the court concludes that the claimant is not an employee or a worker, the tribunal does not have jurisdiction to consider the legal merits of the claim. For these reasons, the common law tests for employment status should be strongly purposive in character where fundamental rights are at stake.[170] Any interpretive doubts about status should be resolved in the putative worker's favour. This is not the same as rewriting the parties' bargain. The common law test must also be formulated in accordance with the constitutional value of legality, and this requires that the legal characterization should be congruent with the reasonable expectations of the parties. Ideally, neither party should be caught unawares by the court's judgment.

In *Bates van Winkelhof*, Lady Hale SCJ noted that the court had to work very hard to conclude that a member of an LLP was *not* a worker.[171] That will often be so in cases of disputed status where the actual work practices are conducted on the footing of an employment relationship, whatever the technical legal characterization. In this way, the justified scepticism about *contract* in determining employment status should not be confused with scepticism about the *common law*.[172] Employment lawyers are rightly concerned with the exclusionary effects of contractual doctrines such as 'mutuality of obligation' or 'substitution clauses' on workers' access to justice. Nevertheless, we cannot live without the common law, because even predominantly statute-based tests of employment status depend for their interpretation upon the common law's background matrix of constitutional values. The jurisprudence of common law fundamental rights enables employment lawyers to make a virtue out of that necessity.

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[169] Allan, *The Sovereignty of Law* (n 19) 169.
[170] For a recent discussion of the 'purposive' approach in labour law, see Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) ch 6.
[171] *Bates van Winkelhof* (n 167) [16].
[172] Jeremias Prassl, 'Members, Partners, Employees, Workers? Partnership Law and Employment Status Revisited. *Clyde & Co LLP v Bates van Winkelhof*' (2014) 43 ILJ 495.

Such an approach would have been very welcome in the recent Court of Appeal case of *Smith v Carillion (JM) Ltd*.[173] This case constituted an extreme version of the status problem, in that there was seemingly no contract at all between the claimant and the defendant. Mr Smith had been employed in a triangular agency arrangement in the construction industry. It was conceded that the end user had provided information about Mr Smith's trade union activities to a blacklisting organization, the Consulting Association, and that this constituted a detriment that had the purpose of penalizing him for taking part in the activities of an independent trade union. The claims related to historic discrimination, and at the relevant time, the statutory protection was confined to 'employees'. Statutory protection was extended to the wider category of 'worker' in 2004. The Court of Appeal rejected Mr Smith's appeal. There was no contract between the end user and Mr Smith, and the facts did not meet the strict common law threshold of necessity in order to imply such a contract at the relevant time.[174] Nor could the interpretative obligation under the Human Rights Act 1998 be brought into play, to the effect that the statutory provision protecting him from detriment should be construed widely in light of Mr Smith's Article 11 and Article 8 rights, because the conduct of the end user predated the enactment of that legislation.

This decision constitutes a signal failure to protect the claimant's fundamental rights at common law. The common law protected fundamental rights prior to 1998, particularly in situations such as this where there was such an egregious violation at the core of freedom of association. Indeed, in both *Bates van Winkelhof* and *Carillion* there is a tendency to treat fundamental rights as belonging to a separate compartment of legal reasoning governed by the Human Rights Act 1998, rather than as a seamless element integrated into general common law reasoning. In applying the common law necessity test for the implication of a contract, it is imperative to ask: necessary to what end? The blacklisting of trade unionists is a serious violation at the very core of freedom of association. Its consequences were catastrophic in destroying Mr Smith's ability to secure employment in his chosen occupation. The implication of a contract of employment between Mr Smith and the end user was necessary to enable Mr Smith to seek protection of his fundamental right to freedom of association. It was also necessary to enable him to gain access to a court to seek an independent adjudication of the legal merits of his claim. The court's refusal to imply the contract of employment between the claimant and the end user left him without the possibility of any legal redress. It was an abdication of the court's constitutional responsibility. This constitutional responsibility required it to loosen the common law test of contractual implication. For example, the test of implication might have required that the facts were *capabl*e of sustaining the implication of a contract of employment. Access to a court is particularly important where the allegation is that other fundamental rights have been violated. This was true in both *Bates van Winkelhof* and *Carillion*.

As with the common law right to strike, it is possible to keep the common law fundamental rights paradigm within appropriate institutional bounds in respect of employment

[173] [2015] EWCA Civ 209, [2015] IRLR 467.
[174] *James v Greenwich LBC* [2008] EWCA Civ 35, [2008] ICR 545.

status. Litigation concerning employment status usually concerns the claimant's access to a court to seek a judgment on the merits of a substantive legal claim protected by statute. Employment status thus engages the fundamental right of access to a court, a right that is securely established at common law. Where the claimant is seeking to vindicate another fundamental right in court, such as freedom of expression (as in *Bates van Winkelhof*) or freedom of association (as in *Carillion*), the normative urgency of the common law right of access to a court is heightened.[175] This does not supplant the democratic role of Parliament. Employment status may be given a more specific statutory elaboration, as with the 'worker' concept. Furthermore, the substantive fundamental rights being asserted in *Bates van Winkelhof* and *Carillion* are statutory rights, whose parameters have been defined by Parliament, and whose contours can be informed by relevant international norms on whistleblowing and blacklisting protections. The common law is therefore subsidiary to legislation in its development of a strong purposive approach to fundamental rights protection. This can provide the *Autoclenz* approach with the stability that it needs to become an enduring feature of common law reasoning.

## VI Conclusion

Cases should be judged on their display of principle and reason, not on who happens to win on the day. A victory for the 'high-status' employee in *Johnson* can just as easily switch into the discovery of a new economic tort applied to striking workers employed on 'zero hours' contracts at a sports retailer. Judging legal reasoning by outcomes is a risky business. There may be little consensus on what a just outcome looks like, particularly in a discipline as 'political' as employment law where protagonists often line up to take sides on the basis of their passions and instinctive class loyalties. If we detach legal reasoning from constitutional constraints when it suits us, we are lost. The social and economic effects of a maverick appellate judiciary may be quite indiscriminate in impact. For every Mr Johnson who enjoys his legal windfall, there will be a Mr Barnard who does not receive his legal due.

None of this should be taken to imply that the identification of those constitutional constraints is an uncontroversial exercise. On the contrary, the interrelationship between Parliament and the courts provokes deep and ongoing interpretive disagreements. The debates reflect normative disagreements about core constitutional concepts such as legality, democracy and legislative supremacy. They also reflect empirical concerns about the real-world functioning of democratic institutions, and the extent to which the opportunities for democratic influence have been eroded by the shameful growth of social and economic inequality in our political community. Eulogies to the democratic role of Parliament are rather hollow if growing numbers of citizens live in conditions of such economic and social precariousness that their political efficacy is illusory. If anything of value comes out of the 'Brexit' referendum result, it might be that our political and

[175] This would not be true of all statutory employment rights. For example, the right to a written statement of terms of employment does not seem a plausible candidate for fundamental right status.

legal elites will finally realize that political consent to unjust political and economic arrangements may not always be forthcoming.

These constitutional debates are particularly intense in respect of common law fundamental rights. In a recent contribution, Sales LJ has observed that:

> Primary law-making authority is vested in Parliament, and it is Parliament's intention which should be the focus of the inquiry. I suggest that the courts should only identify a fundamental right or interest for the purposes of legality if it is plausible to infer that Parliament as a collective body itself recognises such a right or interest …[176]

In a similar vein, he goes on to observe that 'if the Human Rights Act were repealed, the courts might feel distinctly uncomfortable in drawing in any very concrete way on the Convention rights or the case law of the ECtHR as evidence for domestic fundamental rights'.[177]

Such an approach is highly controversial in the light of growing concerns about the impact of economic inequality on equal democratic citizenship and the corresponding distortion of opportunities for democratic influence. As such, the attraction of Sales LJ's position depends upon a set of assumptions about the functioning of democratic institutions that are unlikely to be satisfied at the current time. It is one thing to accord legislation a primary role in specifying the determinate content of abstract fundamental rights, with common law operating in a subsidiary mode. That seems constitutionally reasonable. To render the very existence of a fundamental right dependent upon legislative practices arguably represents an abdication of the judicial role.[178] Labour lawyers will be familiar with the Trade Union Act 2016, a draconian and coercive piece of legislation that simultaneously attempts to choke off the political voice of trade unions whilst circumscribing the right to strike. Should the courts treat this as further evidence for a narrowing horizon for freedom of association, excluding the protection of the political and industrial activities of trade unions contrary to fundamental norms in international law? In these respects, the Trade Union Act 2016 fits with settled legislative dispositions extending back over decades. At times like this, and *pace* Sales LJ, the courts should regard themselves as in a 'conflictual partnership' with Parliament,[179] ready to act as a constitutional counterweight where fundamental rights are systematically eroded by governmental practices. The arguments in favour of judicial activism would be particularly strong when there is an established consensus in state practice and international law identifying the normative core of a fundamental right. Freedom of association,

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[176] Sales (n 136) 99.
[177] ibid 101.
[178] On which, see Bjorge, 'Common Law Rights' (n 139) 232.
[179] The phrase was used by Lord Wedderburn and Paul Davies to provide a pluralist characterisation of employee representation on corporate boards. The term seems particularly apt in this constitutional context, as a way of framing the pluralist character of the collaboration between courts and Parliament in the protection of fundamental human rights. For the original use of the term in the context of corporate law reform, see Paul Davies and Lord Wedderburn, 'The Land of Industrial Democracy' (1977) 6 ILJ 197, 211.

including the right to strike, will not cease to be a fundamental right of citizens even if Parliament declares its negation.

One thing is for sure. *Johnson* provides no support for Sales LJ's suggested approach. Deference and pre-emption is sometimes warranted, as in *Johnson* itself. It is more difficult to justify where the very existence of a fundamental right is at issue. Judicial deference should never become an alibi for judicial cowardice, particularly where vulnerable citizens would otherwise lack an effective democratic voice. This leaves the progressive labour lawyer in the rather discomforting position, not only of supporting Lord Hoffmann in *Johnson*, but of positioning the common law centre stage in the institutional protection of citizens' fundamental rights at work.